

ANCIENT LAW



CHAPTER I

ANCIENT CODES

THE most celebrated system of jurisprudence known to the world begins, as it ends, with a Code. From the commencement to the close of its history, the expositors of Roman Law consistently employed language which implied that the body of their system rested on the Twelve Decemviral Tables, and therefore on a basis of written law. Except in one particular, no institutions anterior to the Twelve Tables were recognised at Rome. The theoretical descent of Roman jurisprudence from a code, the theoretical ascription of English law to immemorial unwritten tradition, were the chief reasons why the development of their system differed from the development of ours. Neither theory corresponded exactly with the facts, but each produced consequences of the utmost importance.

I need hardly say that the publication of the Twelve Tables is not the earliest point at which we can take up the history of law. The ancient Roman code belongs to a class of which almost

every civilised nation in the world can show a sample, and which, so far as the Roman and Hellenic worlds were concerned, were largely diffused over them at epochs not widely distant from one another. They appeared under exceedingly similar circumstances, and were produced, to our knowledge, by very similar causes. Unquestionably, many jural phenomena lie behind these codes and preceded them in point of time. Not a few documentary records exist which profess to give us information concerning the early phenomena of law; but, until philology has effected a complete analysis of the Sanskrit literature, our best sources of knowledge are undoubtedly the Greek Homeric poems, considered of course not as a history of actual occurrences, but as a description, not wholly idealised, of a state of society known to the writer. However the fancy of the poet may have exaggerated certain features of the heroic age, the prowess of warriors and the potency of gods, there is no reason to believe that it has tampered with moral or metaphysical conceptions which were not yet the subjects of conscious observation; and in this respect the Homeric literature is far more trustworthy than those relatively later documents which pretend to give an account of times similarly early, but which were compiled under philosophical or theological influences. If by any means we can determine the early forms of jural conceptions, they will be invaluable to us. These rudimentary ideas are to the jurist what the primary crusts of the earth are to the geologist. They contain, potentially, all the forms

in which law has subsequently exhibited itself. The haste or the prejudice which has generally refused them all but the most superficial examination, must bear the blame of the unsatisfactory condition in which we find the science of jurisprudence. The inquiries of the jurist are in truth prosecuted much as inquiry in physics and physiology was prosecuted before observation had taken the place of assumption. Theories, plausible and comprehensive, but absolutely unverified, such as the Law of Nature or the Social Compact, enjoy a universal preference over sober research into the primitive history of society and law; and they obscure the truth not only by diverting attention from the only quarter in which it can be found, but by that most real and most important influence which, when once entertained and believed in, they are enabled to exercise on the later stages of jurisprudence.

The earliest notions connected with the conception, now so fully developed, of a law or rule of life, are those contained in the Homeric words "Themis" and "Themistes." "Themis," it is well known, appears in the later Greek pantheon as the Goddess of Justice, but this is a modern and much developed idea, and it is in a very different sense that Themis is described in the Iliad as the assessor of Zeus. It is now clearly seen by all trustworthy observers of the primitive condition of mankind that, in the infancy of the race, men could only account for sustained or periodically recurring action by supposing a personal agent. Thus, the wind blowing was a person and of course a divine person; the sun

rising, culminating, and setting was a person and a divine person ; the earth yielding her increase was a person and divine. As, then, in the physical world, so in the moral. When a king decided a dispute by a sentence, the judgment was assumed to be the result of direct inspiration. The divine agent, suggesting judicial awards to kings or to gods, the greatest of kings, was *Themis*. The peculiarity of the conception is brought out by the use of the plural. *Themistes*, *Themises*, the plural of *Themis*, are the awards themselves, divinely dictated to the judge. Kings are spoken of as if they had a store of "Themistes" ready to hand for use ; but it must be distinctly understood that they are not laws, but judgments, or, to take the exact Teutonic equivalent, "dooms." "Zeus, or the human king on earth," says Mr. Grote, in his *History of Greece*, "is not a law-maker, but a judge." He is provided with *Themistes*, but, consistently with the belief in their emanation from above, they cannot be supposed to be connected by any thread of principle ; they are separate, isolated judgments.

Even in the Homeric poems we can see that these ideas are transient. Parities of circumstance were probably commoner in the simple mechanism of ancient society than they are now, and in the succession of similar cases awards are likely to follow and resemble each other. Here we have the germ or rudiment of a custom, a conception posterior to that of *Themistes* or judgments. However strongly we, with our modern associations, may be inclined to lay down *a priori* that the notion of a Custom must precede that of a

judicial sentence, and that a judgment must affirm a custom or punish its breach, it seems quite certain that the historical order of the ideas is that in which I have placed them. The Homeric word for a custom in the embryo is sometimes "Themis" in the singular—more often "Dike," the meaning of which visibly fluctuates between a "judgment" and a "custom" or "usage." Νόμος, a Law, so great and famous a term in the political vocabulary of the later Greek society, does not occur in Homer.

This notion of a divine agency, suggesting the Themistes, and itself impersonated in Themis, must be kept apart from other primitive beliefs with which a superficial inquirer might confound it. The conception of the Deity dictating an entire code or body of law, as in the case of the Hindoo laws of Manu, seems to belong to a range of ideas more recent and more advanced. "Themis" and "Themistes" are much less remotely linked with that persuasion which clung so long and so tenaciously to the human mind, of a divine influence underlying and supporting every relation of life, every social institution. In early law, and amid the rudiments of political thought, symptoms of this belief meet us on all sides. A supernatural presidency is supposed to consecrate and keep together all the cardinal institutions of those times, the State, the Race, and the Family. Men, grouped together in the different relations which those institutions imply, are bound to celebrate periodically common rites and to offer common sacrifices; and every now and then the same duty is even more significantly

recognised in the purifications and expiations which they perform, and which appear intended to deprecate punishment for involuntary or neglectful disrespect. Everybody acquainted with ordinary classical literature will remember the *sacra gentilitia*, which exercised so important an influence on the early Roman law of adoption and of wills. And to this hour the Hindoo Customary Law, in which some of the most curious features of primitive society are stereotyped, makes almost all the rights of persons and all the rules of succession hinge on the due solemnisation of fixed ceremonies at the dead man's funeral, that is, at every point where a breach occurs in the continuity of the family.

Before we quit this stage of jurisprudence, a caution may be usefully given to the English student. Bentham, in his "Fragment on Government," and Austin, in his "Province of Jurisprudence Determined," resolve every law into a *command* of the lawgiver, an *obligation* imposed thereby on the citizen, and a *sanction* threatened in the event of disobedience; and it is further predicated of the *command*, which is the first element in a law, that it must prescribe, not a single act, but a series or number of acts of the same class or kind. The results of this separation of ingredients tally exactly with the facts of mature jurisprudence; and, by a little straining of language, they may be made to correspond in form with all law, of all kinds, at all epochs. It is not, however, asserted that the notion of law entertained by the generality is even now quite in conformity with this dissection; and

it is curious that, the farther we penetrate into the primitive history of thought, the farther we find ourselves from a conception of law which at all resembles a compound of the elements which Bentham determined. It is certain that, in the infancy of mankind, no sort of legislature, nor even a distinct author of law, is contemplated or conceived of. Law has scarcely reached the footing of custom ; it is rather a habit. It is, to use a French phrase, "in the air." The only authoritative statement of right and wrong is a judicial sentence after the facts, not one presupposing a law which has been violated, but one which is breathed for the first time by a higher power into the judge's mind at the moment of adjudication. It is of course extremely difficult for us to realise a view so far removed from us in point both of time and of association, but it will become more credible when we dwell more at length on the constitution of ancient society, in which every man, living during the greater part of his life under the patriarchal despotism, was practically controlled in all his actions by a regimen not of law but of caprice. I may add that an Englishman should be better able than a foreigner to appreciate the historical fact that the "Themistes" preceded any conception of law, because, amid the many inconsistent theories which prevail concerning the character of English jurisprudence, the most popular, or at all events the one which most affects practice, is certainly a theory which assumes that adjudged cases and precedents exist antecedently to rules, principles, and distinctions. The "Themistes" have too

it should be remarked, the characteristic which, in the view of Bentham and Austin, distinguishes single or mere commands from laws. A true law enjoins on all the citizens indifferently a number of acts similar in class or kind ; and this is exactly the feature of a law which has most deeply impressed itself on the popular mind, causing the term "law" to be applied to mere uniformities, successions, and similitudes. A *command* prescribes only a single act, and it is to commands, therefore, that "Themistes" are more akin than to laws. They are simply adjudications on insulated states of fact, and do not necessarily follow each other in any orderly sequence.

The literature of the heroic age discloses to us law in the germ under the "Themistes" and a little more developed in the conception of "Dike." The next stage which we reach in the history of jurisprudence is strongly marked and surrounded by the utmost interest. Mr. Grote, in the second part and ninth chapter of his History, has fully described the mode in which society gradually clothed itself with a different character from that delineated by Homer. Heroic kingship depended partly on divinely given prerogative, and partly on the possession of supereminent strength, courage, and wisdom. Gradually, as the impression of the monarch's sacredness became weakened, and feeble members occurred in the series of hereditary kings, the royal power decayed, and at last gave way to the dominion of aristocracies. If language so precise can be used of the revolution, we might say that the office of the king was usurped by that council of chiefs

which Homer repeatedly alludes to and depicts. At all events from an epoch of kingly rule we come everywhere in Europe to an era of oligarchies; and even where the name of the monarchical functions does not absolutely disappear, the authority of the king is reduced to a mere shadow. He becomes a mere hereditary general, as in Lacedæmon, a mere functionary, as the King Archon at Athens, or a mere formal hierophant, like the *Rex Sacrificulus* at Rome. In Greece, Italy, and Asia Minor, the dominant orders seem to have universally consisted of a number of families united by an assumed relationship in blood, and, though they all appear at first to have laid claim to a quasi-sacred character, their strength does not seem to have resided in their pretended sanctity. Unless they were prematurely overthrown by the popular party, they all ultimately approached very closely to what we should now understand by a political aristocracy. The changes which society underwent in the communities of the further Asia occurred of course at periods long anterior in point of time to these revolutions of the Italian and Hellenic worlds; but their relative place in civilisation appears to have been the same, and they seem to have been exceedingly similar in general character. There is some evidence that the races which were subsequently united under the Persian monarchy, and those which peopled the peninsula of India, had all their heroic age and their era of aristocracies; but a military and a religious oligarchy appear to have grown up separately, nor was the authority of the king generally

superseded. Contrary, too, to the course of events in the West, the religious element in the East tended to get the better of the military and political. Military and civil aristocracies disappear, annihilated or crushed into insignificance between the kings and the sacerdotal order; and the ultimate result at which we arrive is, a monarch enjoying great power, but circumscribed by the privileges of a caste of priests. With these differences, however, that in the East aristocracies became religious, in the West civil or political, the proposition that a historical era of aristocracies succeeded a historical era of heroic kings may be considered as true, if not of all mankind, at all events of all branches of the Indo-European family of nations.

The important point for the jurist is that these aristocracies were universally the depositaries and administrators of law. They seem to have succeeded to the prerogatives of the king, with the important difference, however, that they do not appear to have pretended to direct inspiration for each sentence. The connection of ideas which caused the judgments of the patriarchal chieftain to be attributed to superhuman dictation still shows itself here and there in the claim of a divine origin for the entire body of rules, or for certain parts of it, but the progress of thought no longer permits the solution of particular disputes to be explained by supposing an extra-human interposition. What the juristical oligarchy now claims is to monopolise the knowledge of the laws, to have the exclusive possession of the principles by which quarrels are decided.

We have in fact arrived at the epoch of Customary Law. Customs or Observances now exist as a substantive aggregate, and are assumed to be precisely known to the aristocratic order or caste. Our authorities leave us no doubt that the trust lodged with the oligarchy was sometimes abused, but it certainly ought not to be regarded as a mere usurpation or engine of tyranny. Before the invention of writing, and during the infancy of the art, an aristocracy invested with judicial privileges formed the only expedient by which accurate preservation of the customs of the race or tribe could be at all approximated to. Their genuineness was, so far as possible, insured by confiding them to the recollection of a limited portion of the community.

The epoch of Customary Law, and of its custody by a privileged order, is a very remarkable one. The condition of jurisprudence which it implies has left traces which may still be detected in legal and popular phraseology. The law, thus known exclusively to a privileged minority, whether a caste, an aristocracy, a priestly tribe, or a sacerdotal college, is true unwritten law. Except this, there is no such thing as unwritten law in the world. English case-law is sometimes spoken of as unwritten, and there are some English theorists who assure us that if a code of English jurisprudence were prepared we should be turning unwritten law into written—a conversion, as they insist, if not of doubtful policy, at all events of the greatest seriousness. Now, it is quite true that there was once a period at which the English common law might reasonably have

been termed unwritten. The elder English judges did really pretend to knowledge of rules, principles, and distinctions which were not entirely revealed to the bar and to the lay-public. Whether all the law which they claimed to monopolise was really unwritten, is exceedingly questionable ; but at all events, on the assumption that there was once a large mass of civil and criminal rules known exclusively to the judges, it presently ceased to be unwritten law. As soon as the Courts at Westminster Hall began to base their judgments on cases recorded, whether in the year-books or elsewhere, the law which they administered became written law. At the present moment a rule of English law has first to be disentangled from the recorded facts of adjudged printed precedents, then thrown into a form of words varying with the taste, precision, and knowledge of the particular judge, and then applied to the circumstances of the case for adjudication. But at no stage of this process has it any characteristic which distinguishes it from written law. It is written case-law, and only different from code-law because it is written in a different way.

From the period of Customary Law we come to another sharply defined epoch in the history of jurisprudence. We arrive at the era of Codes, those ancient codes of which the Twelve Tables of Rome were the most famous specimen. In Greece, in Italy, on the Hellenised sea-board of Western Asia, these codes all made their appearance at periods much the same everywhere, not, I mean, at periods identical in point of time, but similar in point of the relative progress of each

community. Everywhere, in the countries I have named, laws engraven on tablets and published to the people take the place of usages deposited with the recollection of a privileged oligarchy. It must not for a moment be supposed that the refined considerations now urged in favour of what is called codification had any part or place in the change I have described. The ancient codes were doubtless originally suggested by the discovery and diffusion of the art of writing. It is true that the aristocracies seem to have abused their monopoly of legal knowledge ; and at all events their exclusive possession of the law was a formidable impediment to the success of those popular movements which began to be universal in the western world. But, though democratic sentiment may have added to their popularity, the codes were certainly in the main a direct result of the invention of writing. Inscribed tablets were seen to be a better depository of law, and a better security for its accurate preservation, than the memory of a number of persons however strengthened by habitual exercise.

The Roman code belongs to the class of codes I have been describing. Their value did not consist in any approach to symmetrical classification, or to terseness and clearness of expression, but in their publicity, and in the knowledge which they furnished to everybody, as to what he was to do, and what not to do. It is, indeed, true that the Twelve Tables of Rome do exhibit some traces of systematic arrangement, but this is probably explained by the tradition that the framers of that body of law called in the assistance

of Greeks who enjoyed the later Greek experience in the art of law-making. The fragments of the Attic Code of Solon show, however, that it had but little order, and probably the laws of Draco had even less. Quite enough too remains of these collections, both in the East and in the West, to show that they mingled up religious, civil, and merely moral ordinances, without any regard to differences in their essential character; and this is consistent with all we know of early thought from other sources, the severance of law from morality, and of religion from law, belonging very distinctly to the later stages of mental progress.

But, whatever to a modern eye are the singularities of these codes, their importance to ancient societies was unspeakable. The question—and it was one which affected the whole future of each community—was not so much whether there should be a code at all, for the majority of ancient societies seem to have obtained them sooner or later, and, but for the great interruption in the history of jurisprudence created by feudalism, it is likely that all modern law would be distinctly traceable to one or more of these fountain-heads. But the point on which turned the history of the race was, at what period, at what stage of their social progress, they should have their laws put into writing. In the Western world the plebeian or popular element in each State successfully assailed the oligarchical monopoly, and a code was nearly universally obtained early in the history of the Commonwealth. But, in the East, as I have before mentioned, the ruling

aristocracies tended to become religious rather than military or political, and gained, therefore, rather than lost in power; while in some instances the physical conformation of Asiatic countries had the effect of making individual communities larger and more numerous than in the West; and it is a known social law that the larger the space over which a particular set of institutions is diffused, the greater is its tenacity and vitality. From whatever cause, the codes obtained by Eastern societies were obtained, relatively, much later than by Western, and were a very different character. The religious oligarchies of Asia, either for their own guidance, or for the relief of their memory, or for the instruction of their disciples, seem in all cases to have ultimately embodied their legal learning in a code; but the opportunity of increasing and consolidating their influence was probably too tempting to be resisted. Their complete monopoly of legal knowledge appears to have enabled them to put off on the world collections, not so much of the rules actually observed as of the rules which the priestly order considered proper to be observed. The Hindoo Code, called the Laws of Manu, which is certainly a Brahmin compilation, undoubtedly enshrines many genuine observances of the Hindoo race, but the opinion of the best contemporary orientalists is, that it does not, as a whole, represent a set of rules ever actually administered in Hindostan. It is, in great part, an ideal picture of that which, in the view of the Brahmins, ought to be the law. It is consistent with human nature and with the special motives of their authors.

that codes like that of Manu should pretend to the highest antiquity and claim to have emanated in their complete form from the Deity. Manu, according to Hindoo mythology, is an emanation from the supreme God ; but the compilation which bears his name, though its exact date is not easily discovered, is, in point of the relative progress of Hindoo jurisprudence, a recent production.

Among the chief advantages which the Twelve Tables and similar codes conferred on the societies which obtained them, was the protection which they afforded against the frauds of the privileged oligarchy and also against the spontaneous depravation and debasement of the national institutions. The Roman Code was merely an enunciation in words of the existing customs of the Roman people. Relatively to the progress of the Romans in civilisation, it was a remarkably early code, and it was published at a time when Roman society had barely emerged from that intellectual condition in which civil obligation and religious duty are inevitably confounded. Now a barbarous society practising a body of customs, is exposed to some especial dangers which may be absolutely fatal to its progress in civilisation. The usages which a particular community is found to have adopted in its infancy and in its primitive seats are generally those which are on the whole best suited to promote its physical and moral well-being ; and, if they are retained in their integrity until new social wants have taught new practices, the upward march of society is almost certain. But unhappily there is a law of development which

ever threatens to operate upon unwritten usage. The customs are of course obeyed by multitudes who are incapable of understanding the true ground of their expediency, and who are therefore left inevitably to invent superstitious reasons for their permanence. A process then commences which may be shortly described by saying that usage which is reasonable generates usage which is unreasonable. Analogy, the most valuable of instruments in the maturity of jurisprudence, is the most dangerous of snares in its infancy. Prohibitions and ordinances, originally confined, for good reasons, to a single description of acts, are made to apply to all acts of the same class, because a man menaced with the anger of the gods for doing one thing, feels a natural terror in doing any other thing which is remotely like it. After one kind of food has been interdicted for sanitary reasons, the prohibition is extended to all food resembling it, though the resemblance occasionally depends on analogies the most fanciful. So again, a wise provision for insuring general cleanliness dictates in time long routines of ceremonial ablution ; and that division into classes which at a particular crisis of social history is necessary for the maintenance of the national existence degenerates into the most disastrous and blighting of all human institutions—Caste. The fate of the Hindoo law is, in fact, the measure of the value of the Roman Code. Ethnology shows us that the Romans and the Hindoos sprang from the same original stock, and there is indeed a striking resemblance between what appear to have been their original customs. Even now, Hindoo juris-

prudence has a substratum of forethought and sound judgment, but irrational imitation has engrafted in it an immense apparatus of cruel absurdities. From these corruptions the Romans were protected by their code. It was compiled while usage was still wholesome, and a hundred years afterwards it might have been too late. The Hindoo law has been to a great extent embodied in writing, but, ancient as in one sense are the compendia which still exist in Sanskrit, they contain ample evidence that they were drawn up after the mischief had been done. We are not of course entitled to say that if the Twelve Tables had not been published the Romans would have been condemned to a civilisation as feeble and perverted as that of the Hindoos, but thus much at least is certain, that *with* their code they were exempt from the very chance of so unhappy a destiny.

NOTE A

ANTIQUITY OF ROMAN LAW

THE description of Roman law, in the preface to the first edition, as "bearing in its earlier portions the traces of the most remote antiquity," is literally correct unless, contrary to the usage of good authors, we press the superlative to its extreme construction, as if it had been meant to exclude the possibility that traces of still more remote antiquity may be found elsewhere. Maine obviously did not mean to deny that Germanic and Hindu law, for example, have at some points preserved more archaic features than those of the earliest Roman law known to us; much less to disparage the extremely modern character of classical Roman law, which gives it most of its value for modern jurisprudence: compare the passage cited from "Early Law and Custom" in Note F below. It may be still a natural temptation for a student unacquainted with other legal antiquities to suppose

that the law of the Twelve Tables, or the law of the later Roman Republic as a whole, belongs to a more archaic type than it really does. Fifty years ago the temptation was almost inevitable; and we have to remember that Maine had been endeavouring, with indifferent success at the time, to revive the study of Roman law in a country where the educated public was in a state of absolute ignorance on the subject (as it probably still is), and the tradition of the civilians, confined, under the old division of jurisdictions and practice, to a small minority of the legal profession, was at least a century out of date. If Maine did use language tending to exaggerate the intrinsic merits and the practical importance of Roman jurisprudence, it was under those conditions a fault on the right side. But modern students must be warned not to assume that Roman law was in fact at any one time a perfect and symmetrical whole, or that its history can be deduced from any one formula. The Twelve Tables were no doubt regarded as an ultimate source of law for the field they covered, but they did not purport to include the whole of the recognised customary law. For the classical period of the Empire the most important and fruitful written embodiment of law was the Prætor's Edict, as almost every title of the Digest bears witness. Moreover, the Twelve Tables themselves were no mere consolidation, but a reforming code. It is certain that they incorporated Greek materials, and it is of very little importance whether the story of a special commission being sent to Greece is literally acceptable or not. In any case the means of information were at hand in the Greek cities of southern Italy, a region where the Greek language is not yet extinct. Borrowing of this kind from neighbours who have reached a more advanced stage is by no means abnormal in archaic legislation. Indeed, it is rather common for the law-giver of the heroic age to be represented as a stranger, or as having learnt the wisdom of older and greater kingdoms; and even if the personal element of such a tradition is dubious, it is not likely to be a gratuitous invention. Ingenious paradoxical doubts have quite lately been cast on the antiquity of the Twelve Tables; but the hypothesis that they are really a compilation or fabrication of the second century B.C. has not met with a favourable reception: see Dr. A. H. J. Greenidge, "The Authenticity of the Twelve Tables," *English Historical Review*, January, 1905, and Professor Goudy in the *Juridical Review*, June, 1905. It is perhaps unnecessary to warn English students against implicit acceptance of the conjectural restorations of the Decemvirs' work essayed by various learned persons. The most elaborate of these, that of Voigt, is described by the no less learned M. Girard as containing "*une restitution tout à fait inacceptable et un commentaire fort aventureux*" (*Manuel élémentaire du droit romain*, 3^e éd., 1901,

p. 23). Dr. Roby ("Roman Private Law in the Times of Cicero and of the Antonines," 1902, vol. i., p. x) calls it in even plainer terms a house of cards.

NOTE B

CUSTOMARY LAW IN HOMER

Maine's reference to the Homeric poems as some of our best evidence for the archaic forms of legal ideas in Indo-European communities is a brilliant example of his insight. As he points out, the poet or poets had no conscious theory of the matter at all, and this is our best warranty for the witness of the poems being true. They describe a society in which custom is understood if not always observed, positive duties are definable if not easily enforceable, and judgments are rendered with solemnity and regarded as binding, although we hear nothing of any standing authority such as could be called either legislative or executive in the modern sense. And Maine is clearly right in holding (p. 2) that the description is not wholly idealised—we might even say not much—and is of a state of society known to the writer. To all appearance the usages described are real, and those of the singer's own time. The deliberate archaism of modern fiction has no place in Homer; only the wealth and prowess of the heroic age are exaggerated. The *Chanson de Roland* endows Charlemagne and his peers with the arms and manners of the twelfth century, as the Arthurian cycle attributes those of the fourteenth to the knights of the Round Table; and we cannot believe that Homer did otherwise.

Maine gives a hint (p. 6) that the analysis of positive law laid down by Bentham and Austin (following Hobbes, though Bentham seems not to have been aware of it) cannot be made to fit archaic society. For in communities like those of the Homeric age, or of Iceland as described in the Sagas, there is no sovereign (in Hobbes's sense) to be found, nor any legislative command, nor any definite sanction; and yet in Iceland there were regularly constituted courts with a regular and even technical procedure, as the *Njáls Saga* tells us at large. Maine afterwards worked out this position in the lectures on Sovereignty in "The Early History of Institutions," which are the foundation of sound modern criticism on the Hobbist doctrine. In those classical pages he dealt rather tenderly with Bentham and Austin, whom to some extent he regarded as his masters, in spite of the wholly unhistorical character of their work; and, apart from any particular feeling in this case, it was not his habit to exhibit the full consequences of his ideas. Those who come after him are free to push the conclusion home, as Mr. Bryce has done ("Studies in History and

Jurisprudence," Essay X). As to the absence of executive sanction in archaic procedure, cp. "Early Law and Custom," p. 170.

With regard to the "Themistes" of the Homeric chiefs, the word appears to be not an anomalous plural of *θέμις*, but distinct, and to mean principles of law or justice; "Themis," the singular noun, being "right" in the abstract sense (E. C. Clark, "Practical Jurisprudence," pp. 42-9). Once it means "tribute," which does not offer much difficulty when compared with the constant use of *consuetudo* in mediæval Latin. Some of the language used here by Maine seems to imply that the decisions called by this name were or might be arbitrary; but Maine himself added the desirable qualification in his chapter on "The King and Early Civil Justice." "The Homeric King is chiefly busy with fighting. But he is also a judge, and it is to be observed that he has no assessors. His sentences come directly into his mind by divine dictation from on high." That is, if the king is just; we read in the Iliad, though it occurs only in the course of a simile, of unjust kings who give crooked judgments, disregarding the voice of the gods:

ὅς δ' ὑπὸ λαίλαπι πᾶσα κελαίῃη βέβριθε χθῶν
 ἡματ' ὀπωρῶν, ὅτε λαβρότατον χέει ὕδωρ
 Ζεὺς, ὅτε δὴ ῥ' ἀνδρεσσὶ κοτεσσάμενος χαλεπήνῃ,
 οἷ βίῃ εἰν ἀγορῇ σκολιὰς κρίνωσι θέμιστας,
 ἐκ δὲ δίκην ἐλάσῃσι, θεῶν δ' οὐκ ἀλέγοντες . . .

II. 384 sqq.

"These sentences, or *θέμιστες*—which is the same word with our "Teutonic word 'dooms'—are doubtless drawn from pre-existing custom or usage, but the notion is that they are conceived by the king spontaneously or through divine prompting. It is plainly a later development of the same view when the prompting comes from a learned lawyer, or from an authoritative law-book" ("Early Law and Custom," p. 163).

Custom, indeed, is so strong in Homer that the gods themselves are bound by it. Zeus is the greatest of chiefs, but he owes justice to his people, and justice implies the observance of rule. Power is not wanting, but a sense of duty moderates it. Thus in the Iliad Zeus is tempted to rescue Sarpedon from his fate, but dares not break his custom in the face of Hera's rebuke ("Do it if thou wilt: but the rest of the gods in no wise approve": II. 443): and in the Odyssey the Sun-God threatens to go down and shine among the dead men if he is not to be avenged for the sacrilege of Odysseus' men who have killed and eaten his oxen:—

Ζεῦ πάτερ ἦδ' ἄλλοι μάκαρες θεοὶ αἰὲν ἐόντες,
 τίσαι δὴ ἐτάρους Λαερτιάδεω Ὀδυσῆος,
 οἳ μιν βοὺς ἔκτειναν ὑπέρβιον, ἦσαν ἐγὼ γε
 χαίρεσκον μὲν ἰὼν εἰς οὐρανὸν ἀστερόεντα,
 ἦδ' ὅπῃτ' ἄψ' ἐπὶ γαίαν ἀπ' οὐρανόθεν προτραποίμην.
 εἰ δέ μοι οὐ τίσουσιν βοῶν ἐπιεικέ' ἀμοιβήν,
 δῶσομαι εἰς Ἀΐδαο καὶ ἐν νεκρέσσι φαείνω.

μ. 377 sqq.

NOTE C

EARLY FORMS OF LAW: "WRITTEN" AND "UNWRITTEN"
LAW: EARLY CODES

It should be noted that the growth of institutions is much too complicated, even if we confine our attention to one society, to be represented as a simple series in order of time. We constantly speak of one rule or custom as belonging to a more advanced stage of ideas than another; but this does not mean that in every society where it is found it must have been preceded in fact by a less advanced institution belonging to the next lower grade of culture. Imitation of neighbours or conquerors, or peculiar local conditions, may materially shorten a given stage in the normal development, or even cut it out altogether. What we do mean is that the order is not found reversed. Chalk is not everywhere in England, nor red sandstone; but where red sandstone is, we know that chalk is not below it. Iron was known in Africa so early that Africa may be said not to have had a bronze age; but this does not make it more credible that any tribe should ever have abandoned iron for bronze. In like manner there may have been tribes that had lawgivers almost or quite as soon as they had judges. But no one has heard of a nation which, having acquired a body of legislation, reverted from it to pure customary law (cp. Kohler, "Zur Urgeschichte der Ehe," pp. 7-10).

A king's or chieftain's judicial dooms are very different from express laws promulgated for general observance; but it is noticeable that early traditions ascribe a divine origin to both. In the former case the judge enjoys, in some undefined way, the confidence of the gods; in the latter the human lawgiver is merely the scribe or reporter of a "Deity dictating an entire code or body of law," which, as Maine points out (above, p. 5), is a more artificial conception and belongs to a later stage. It appears, however, as early as anything that can be called legislation; and the tendency to refer the commandments of the law to a divine or semi-divine origin is quite regular. There is no reason, it may be added, why a lawgiver or recorder of divine law should not also be a speaker of dooms. A ruling ascribed to Moses, whom Sir Edward Coke claimed as the first law reporter, is at this day a practical decision, for it governs the civil law of succession in some Jewish communities (such as the Jews of Aden: Sir Courtenay Ilbert, "The Government of India," p. 397). Even if the Mosaic law has to admit the superior antiquity of King Hammurabi's code, we may safely say that the case of Zelophehad's daughters is the earliest recorded case which is still of authority.

When the king or chief ceases to bear all offices in his own person,

and the political division of labour begins, those functions which had a sacred character naturally become attached to a priesthood or sacred tribe or family, and among them the custody and interpretation of the law. The distinction between religious and secular law is, one need hardly say, much later. Thus we find in both Germanic and Roman antiquity more than traces of priests, or nobles who claimed the priest's office as a birthright, being the first judges (Grimm, "D.R.A." 272, i. 378 in 4th ed.). In Iceland the rather vague but not ineffectual authority which was ascribed to the Speaker of the Law seems to have had a religious character. At any rate we read in the *Njáls Saga* that to him, and him alone, was left the momentous decision of the question, which had all but led to civil war, whether Christianity should be adopted (Dasent, "*Burut Njal*," ch. ci.). There seems to be no reason against accepting this incident as mainly historical. It is worth observing that Thorgeir would not make his award until both the Christian and the heathen party had given pledges to abide by it: a striking illustration of the voluntary and arbitral character of early jurisdiction. Edward I. of England, more than two centuries later, used similar precaution when he adjudicated on the claims to the crown of Scotland.

Whether a monopoly of legal knowledge is established in the hands of a privileged caste or order, or a tradition of learning is handed down in something like a school, or, without any profession of secrecy, certain persons enjoy for the time being the reputation of superior knowledge, appears to depend on the particular circumstances of each community. Besides the Speaker of the Law, we find in the Iceland of the Sagas a few specially wise men, *Njál* himself, and after his death one or two others, whose advice is eagerly sought by their neighbours, and whose deliberate opinion is almost conclusive; yet there is no possible distinction of race or rank in that singularly homogeneous republic. A like position is ascribed to Nestor. This kind of reputation is obviously not less but more important in a society where jurisdiction and judicial power have not yet become compulsory; for the chances that any judgment or award will be observed will, in such a society, depend largely on the respect in which the acting judge or daysman is held.

Maine adds that law preserved as a kind of trade secret by a privileged class is the only real unwritten law. This may be literally true. But our current professional use of the term is really a matter of literary convention. We find it useful to confine the term "written law" to an enactment or declaration which is authoritative not only in matter but in form, so that its very words not only contain but constitute the law. An exposition whose very words are not binding is "unwritten law," however great its authority may be in substance. Consider the case of a judge in England, or

any other jurisdiction under the system of the Common Law, making a careful statement of some point of law in a book written and published by him. This is only a private learned opinion, and has, properly speaking, no authority at all. But the same or another judge may adopt the statement in a reported judgment. It then acquires authority as a judicial exposition of the law, but still its actual terms are not binding, and it counts as "unwritten law." Finally, the proposition may be embodied in a statute. It then becomes "written law," and the Courts will have for the future to treat not only the substance but every word of it as authentic. The distinction is quite real, and no better way of expressing it has been found. French usage, moreover, presents a close analogy. Under the old monarchy the provinces of written law (*pays de droit écrit*) were those where the texts of Roman law were received as having binding authority, while in the *pays de droit coutumier* they were cited only for example and illustration, on the merits of the reason embodied in them, as they may be and sometimes are in England. Thus the same text might be "written" law in one province and "unwritten" (though there is no corresponding French term) in another. A learned modern writer says of the antithesis between *ius scriptum* and *ius non scriptum*, after careful examination of the various meanings with which they occur in the writings of the classical Roman lawyers: "Its general practical use with them is as a distinction between customary law, on the one hand, and law drawn up and issued in any regular manner by any legislative authority, on the other. . . . The above is also the practical use of the distinction . . . by our English jurists, so far as they use it at all. . . . With modern Continental writers *written* and *unwritten* in general designate respectively *enacted* and *customary* law" (E. C. Clark, "Practical Jurisprudence," p. 272).

Maine's brief remarks on early codes (above, pp. 12-18) include a few sentences on Hindu law; these were written at a time when the existence of the books called by the names of Manu and Narada was hardly known outside Anglo-Indian official circles except to a few students of Sanskrit. In later years, after having been a member of the Government of India, he returned to the subject. The chapters in "Early Law and Custom" on "The Sacred Laws of the Hindus," "Religion in Law," and "Classifications of Legal Rules," should be read accordingly as a supplement; and the second and third lectures in "Village Communities" should also be consulted as to the general nature of archaic customary law, and the effect produced on it by contact with a modern system.

An entirely new light has been thrown on the early history of written law by the discovery of Hammurabi's Babylonian code; an extensive, practical, and mainly secular code which dates from considerably more than two thousand years before the Christian era, which seems to presuppose even earlier authentic dooms

committed to writing, and which refers to conveyancing documents as in common use (English translation by C. H. W. Johns, Edinb. 1903). Less striking, but still of importance, are the Tables of Gortyn in Crete, discovered in 1884. They are later than the Roman Twelve Tables, but preserved in an authentic and not much mutilated inscription. See Dr. H. J. Roby thereon, with translation, *L.Q.R.* ii. 135.

Timely codification of customs, as Maine observes (pp. 14, 15), may prevent degradation; I must confess that the ascription of such an effect to the Twelve Tables, though ingenious and pleasing as a conjecture, appears to me to go beyond what is warranted by our knowledge of the state and tendencies of Roman society under the earlier Republic. It is certain that conversely the fixing of law in a codified form at a later stage may arrest a normal and scientific development. Such was the result of the Ordinance which stereotyped the French law of negotiable instruments in 1673 (Chalmers, "Bills of Exchange," Introduction, p. lvi). It would seem, indeed, that the Twelve Tables themselves went near to stereotype an archaic and formalist procedure, and that the Romans of later generations escaped from great inconvenience only by the devices of legal fictions and equity which Maine considers in the following chapter